IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE OF DELAWARE,)	
)	
)	
V.)	
)	
MICHAEL E. KEYSER,)	ID No. 0310021647
)	
Defendant.)	

Submitted: March 30, 2012 Decided: June 29, 2012

On Defendant's Motion for Postconviction Relief - DENIED.

OPINION

Marie Graham, Esquire, Department of Justice, 102 W. Water Street, Dover, DE 19904. Robert O'Neill, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorneys for State of Delaware.

Michael E. Keyser, James T. Vaughn Correctional Center, Smyrna, DE 19977. *Pro Se* Defendant.

CARPENTER, J.

INTRODUCTION

Michael Keyser has filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 to set aside his murder conviction. Keyser alleges prosecutor misconduct, judicial abuse, and ineffective assistance of counsel. For the reasons set forth below, Keyser's Motion for Postconviction Relief is DENIED.

BACKGROUND

In 2004, Keyser was charged with murder in the first degree, conspiracy in the first degree, and abuse of a corpse relating to the death of Kimberly Holton. The trial evidence established that Keyser and Jacob Jones together murdered Holton in a local hotel and then put her body in the trunk of Jones' car. Jones then rented an airplane from Dover Air Park and dropped the body into the river as he circled over the Delaware Bay. Boaters found Holton's body about a week later, three miles from the coast of Cape May, New Jersey.

Jones committed suicide soon after Holton's murder. Keyser, upon hearing about Jones' death, on his own initiative drove to the police station and agreed to be interviewed about the death of Holton. The police taped Keyser's statements. Keyser told the police that Jones planned to kill Holton and that Jones had threatened to kill Keyser and Keyser's girlfriend if Keyser did not assist him. He

described to the police the events that occurred at the hotel, and while his version of what occurred was self-serving and not completely honest, it provided a basis for the police to subsequently arrest Keyser.

Keyser was represented by Joseph A. Gabay, Esquire, and Beth D. Savitz, Esquire (collectively, "counsel") during the trial and appeal of his case. During this time both attorneys were in private practice. When Keyser's family initially contacted Ms. Savitz's firm to represent Keyser, the firm decided to seek the assistance of counsel with experience defending murder cases and contacted Mr. Gabay. Ms. Savitz and Mr. Gabay conducted a thorough pretrial investigation, reviewing approximately thirty tapes of witnesses' and Keyser's statements to the police and interviewing witnesses. Eventually counsel negotiated an attractive plea bargain for Keyser, which Keyser rejected. The jury found Keyser guilty of murder in the first degree and conspiracy in the first degree to commit murder and recommended that the death penalty be imposed. However, the Court sentenced him to life in prison. Keyser appealed to the Supreme Court of Delaware, and the Supreme Court concluded that Keyser's claims were without merit and affirmed his conviction.

PROCEDURAL POSTURE OF THE MOTION

Keyser now advances three broad grounds for relief pursuant to Superior Court Criminal Rule 61: (1) ineffective assistance of counsel; (2) prosecutor misconduct; and (3) judicial abuse of discretion. Keyser supports each of these grounds for relief with numerous sub-claims.

Before considering a postconviction relief claim, the Court must determine whether the claim satisfies Rule 61(i)'s four procedural requirements.¹ First, a motion for postconviction relief must be filed within one year of the conviction's final judgment.² Second, the motion must not assert any ground for relief not raised in a prior postconviction motion.³ Third, the motion must not advance any claims the movant did not raise in the proceedings leading to his conviction unless he shows cause for relief from the procedural default and prejudice from the violation of his rights.⁴ Fourth, the motion must not contain any claim that has already been adjudicated in a proceeding leading to the conviction unless the interest of justice requires reconsideration.⁵ A movant may escape Rule 61's first three procedural bars if the movant claims that the court lacked jurisdiction or that

¹ See Bailey v. State, 588 A.2d 1121, 1127 (Del. 1991) ("The first inquiry in any analysis of a post-conviction relief claim is whether the petition meets the procedural requirements of Rule 61.").

² Super. Ct. Crim. R. 61(i)(1).

³ Super. Ct. Crim. R. 61(i)(2).

⁴ Super. Ct. Crim R. 61(i)(3).

⁵ Super. Ct. Crim. R. 61(i)(4).

there was a miscarriage of justice because of a constitutional violation pursuant to Rule 61(i)(5).

At the outset, the Court notes that Keyser has satisfied Rule 61(i)'s first procedural requirement because he timely filed his motion. The second requirement is inapplicable because Keyser hasn't filed any previous postconviction motions. But the third and fourth bars to relief—concerning procedural default and former adjudication, respectively—apply to many, if not most, of Keyser's claims. This opinion will address each of Keyser's claims and for each will first determine whether that claim is barred by the limitations set forth in Rule 61. But in recognition of the gravitas of Keyser's life sentence, the Court on occasion will touch upon the merits of procedurally barred claims in order to bring some finality to Keyser's case.

Over the years Keyser has made numerous and often overlapping complaints against counsel, the State, and the Court. This led the Court to take the unusual step of appointing new counsel to assist Keyser in the presentation of this motion for postconviction relief. The Court also held an evidentiary hearing examining trial counsel regarding the actions they took on Keyser's behalf, and the Court gave counsel an unusually long period of time after the hearing to attempt to locate documents and witnesses to support Keyser's assertions,

particularly those related to the circumstances surrounding his statements to the police. Unfortunately for Keyser, these efforts provided little, if any, support for his claims, and even eventually led to his appointed counsel requesting to be removed as Keyser continued to complain about the efforts counsel was making on Keyser's behalf. The Court granted counsel's request and this again led to a series of correspondence between Keyser and the Court relating to his motion for postconviction relief, which unfortunately delayed the issuing of this opinion. The Court has been extremely patient and has allowed more time than is normally given such matters to ensure every possible effort has been undertaken to address Keyser's concerns in light of his sentence.

Keyser sent his last correspondence to the Court in March, and since it now appears that all available avenues to discover additional evidence have been exhausted, the Court will issue its opinion. While the Court will focus the opinion only on the claims raised in Keyser's motion, it hopes, but is not optimistic, that it will lay to rest any tangential concerns that Keyser may have with his case. The Court does not doubt Keyser's guilt and spared his life in spite of the jury's recommendation that he be put to death. As this opinion will demonstrate, Keyser has only himself to blame for the foolish conduct that led to the death of an

innocent young girl, and his numerous efforts to shift blame to others will never change that fact.

DISCUSSION

Ineffective assistance of counsel

Keyser advances eight broad ineffective assistance claims against counsel. These claims are: (1) failure to conduct certain pretrial investigations; (2) failure to inform Keyser of his case; (3) use of abusive language and coercive tactics; (4) failure to move the trial out of Kent County; (5) failure to move to disqualify the judge; (6) failure to object to certain evidence; (7) failure to handle jury issues; and (8) failure to move to suppress certain evidence.

Keyser can only prevail on his claims of ineffective assistance of counsel if they are not procedurally barred by Rule 61(i) and if his claims satisfy the two-part test articulated in *Strickland v. Washington*.⁶ Per *Strickland*, Keyser must first show that "counsel's representation fell below an objective standard of reasonableness." When evaluating counsel's conduct, the Court indulges "a strong presumption that counsel's conduct was professionally reasonable." Second, Keyser must demonstrate that counsel's performance prejudiced his

⁶ 446 U.S. 668 (1984).

⁷ Strickland, 446 U.S. at 687-88; see also Cook v. State, 2000 WL 117695, at *3 (Del. Aug. 14, 2000).

⁸ Albury v. State, 551 A.2d 53, 59 (Del. 1998).

defense.⁹ In other words, there must have been a reasonable probability that the trial's outcome would have been different but for counsel's error.¹⁰ A reasonable probability means "a probability sufficient to undermine confidence in the outcome" of the proceeding.¹¹

1. Counsel's pretrial investigations

Keyser first alleges that counsel was ineffective for failing to conduct pretrial investigations related to (a) Holton's injuries; (b) Dover Air Force Base records; (c) the location of the Holton's body; (d) Keyser's mental health; and (e) Keyser's girlfriend.

a. Holton's injuries

Keyser argues that counsel was ineffective for failing to conduct a medical investigation of Holton's body because a medical investigation would have shown that Holton's injuries were inconsistent with those sustained from a fall of 3,200 feet and submersion under water. None of Rule 61(i)'s procedural bars apply to this claim, but even if Keyser is correct, his assertions would have no bearing on the outcome of the trial. The State's medical expert, Dr. Chase Blanchard, determined that Holton died before she was pushed from the airplane. Keyser's counsel discussed Holton's injuries with former Delaware Chief Medical

⁹ Strickland, 446 U.S. at 687.

 $^{^{10}}$ Id

¹¹ Strickland, 466 U.S. at 694.

Examiner Ali Hameli, M.D., several times and Dr. Hameli could not refute any of Dr. Blanchard's findings with a reasonable degree of medical certainty. In fact, Dr. Hameli also concluded that it was more likely than not that Holton died before being pushed out of the airplane. Counsel made the objectively reasonable decision not to further investigate whether Holton's injuries were consistent with a fall from a great distance into the bay given the opinions of two doctors. The Court also notes that Holton's body had been in the bay for days and its condition was significantly compromised as a result. Counsel took reasonable steps to confirm the findings of the State's expert and nothing more was required or necessary in the defense of the case.¹²

Keyser questions Dr. Blanchard's medical credibility due to Dr. Blanchard's prior license revocation. The Court reviewed this matter in camera and found Dr. Blanchard's testimony admissible. Moreover, the fact that Dr. Hameli concurs with Dr. Blanchard's opinions undercuts any suggestion that Dr. Blanchard's past suspension contaminates her current conclusions. The Court is satisfied that Dr. Blanchard's testimony, reinforced by Dr. Hameli, supports the finding that Holton died before being pushed out of the airplane. Keyser presents no medical evidence to support a contradictory conclusion.

¹² Evidence of Holton's postmortem injuries would have been relevant to the charge of abuse of a corpse, but the State dropped this charge against Keyser.

Keyser also insists that, had counsel investigated the matter, counsel would have discovered that Dr. Blanchard's autopsy was less than thorough, a fact counsel could have capitalized on when Dr. Blanchard suggested to the jury that Holton died of asphyxiation. The trial transcript reveals that counsel acted just as Keyser argues they should have. Counsel moved for a mistrial when Dr. Blanchard made this statement and when the Court denied the motion counsel cross-examined Dr. Blanchard to demonstrate to the jury the very shortcomings of the autopsy that Keyser now protests. Counsel's questioning established that Dr. Blanchard could not find marks of strangulation because of the decomposition of Holton's body and counsel got Dr. Blanchard to admit that she did not dictate during the autopsy, thereby weakening the reliability of her testimony. Based on counsel's cross-examination of this witness, the Court can say with confidence that counsel did not fall below the objective standard of reasonableness in handling the medical investigation evidence in this case. As a result, the Court will not sustain this claim of ineffective assistance of counsel.

b. Dover Air Force Base records

Keyser next alleges counsel was ineffective because they failed to subpoena or file a Freedom of Information Act request for documents and videos from Dover Air Force Base ("Dover AFB").

Keyser makes several arguments as to how the Dover AFB records would have supported his defense while at the same time admitting that all visitor records are destroyed after three months and all videotapes are destroyed after thirty days. Holton was murdered in late September 2003 but Keyser's family did not retain counsel until 2004. By Keyser's own admission, Dover AFB visitor records would have been destroyed before counsel's retention, and there would not have been any records for counsel, once retained, to access. Under such circumstances, the Court cannot possibly find counsel's decision not to request the records and videos objectively unreasonable. In addition, Keyser does not explain how the admission of the visitor records or videos into evidence would have changed the outcome of his trial. Again, the jury found Keyser guilty of murder, and the evidence presented at trial strongly supported a finding that Holton was murdered before Jacob Jones loaded her body into the plane. Whatever Keyser may or may not have done after that point could not have affected the outcome of his trial. Even if a video existed, it would only suggest how the body was disposed of and would not contradict the overwhelming evidence of her murder. This would not have helped Keyser's defense, and for these reasons the Court denies Keyser's second ineffective assistance of counsel claim.

c. Body Location

Keyser alleges counsel was ineffective for failing to investigate whether Holton's body could have reached the location where it was discovered from the point where her body was allegedly pushed from an airplane. This claim is not barred by Rule 61(i). The State presented evidence that water currents were moving north, and Keyser argues that, had counsel investigated the matter, they would have discovered that water currents were actually moving south. The Court finds Keyser's claim unsupported by scientific evidence, but even if true, this evidence would not have changed the outcome of Keyser's trial because the location of Holton's body after she was murdered was irrelevant to the charges against him. There is little dispute that Holton's body was dumped from an airplane flying over the Delaware Bay, and how the body traveled once submerged in the bay was simply immaterial to a defense against the homicide charges. The Court cannot find that counsel's actions in this instance amounted to ineffective assistance of counsel, and the claim is denied.

d. Keyser's mental health

Keyser next contends counsel was ineffective for failing to investigate his mental health in connection with the statements he made to the police. This claim is not procedurally barred, but at an evidentiary hearing on this matter counsel

the time of the murder and Keyser's arrest. A standard intake form from the correctional facility where Keyser was held supports this testimony. On the form, Keyser indicated that he was not prone to suicidal thoughts or afraid that he "might lose his mind," and the intake officer observed that Keyser was cooperative. It is true that Keyser attempted suicide shortly after he entered the correctional facility, but this suicide attempt does not relate, in any obvious way, to his mental condition at the time he made his statements to the police. It simply is a reflection of the very difficult situation Keyser found himself in after being charged with murder and learning that the individual he held most responsible for the murder had killed himself. This was not a good situation for Keyser, and not surprisingly he looked for a way out of the predicament.

Furthermore, Keyser maintained an active role in the development of his case and articulated relevant questions to counsel concerning its progress. He even suggested that his suicide attempts in prison might support an incompetency hearing. This led counsel to believe that Keyser did not suffer from any mental illness in prison and most likely did not suffer from any mental illness prior to his incarceration. Nonetheless, counsel had Dr. Edward Dougherty evaluate Keyser before the penalty phase of Keyser's trial. Dr. Dougherty diagnosed Keyser with

chronic depression and attention deficit hyperactive disorder, but these findings gave counsel no basis to file a motion to suppress Keyser's statements to the police. The information counsel received from the intake officer and Dr. Dougherty, as well as counsel's own observations, gave counsel no reason to further investigate Keyser's mental state.

There is also no probability that a pretrial investigation of Keyser's mental health would have changed the trial outcome. An examination might have shown that Keyser's mental health deteriorated after his arrest—not unusual in light of the legal trouble he was facing—but this would not reflect incompetency at the time he made his statements to the police. If anything, the opposite is true: the record shows that Keyser went to the police station of his own initiative three times, and the tapes evince coherent confessions.

e. Keyser's girlfriend

Keyser claims counsel was ineffective because they didn't ask Kathy

Pippin, his girlfriend, about Keyser's statements to the police. This claim is not

procedurally barred. Keyser insists that counsel should have asked Pippin about

his alleged substance abuse prior to his statements because he informed counsel

that he told the police he had been drinking, taking medicine, and having trouble

sleeping. Counsel discussed with each other whether Keyser might have been

intoxicated at the police station, but upon listening to Keyser's taped statements they concluded that Keyser did not sound any different than he did in his discussions with counsel.

This allegation cannot survive the *Strickland* test because counsel's representation did not fall below an objective standard of reasonableness. Counsel reasonably concluded that Keyser was not under the influence of any substances at the police station based on their familiarity with Keyser's sober demeanor and his taped confessions. It would also seem reasonable to the Court that if Pippin, who testified during the trial, had any information regarding this issue that would have potentially helped Keyser, she would have not only provided that information to counsel but also would have used the opportunity of her testimony to disclose that information. She didn't, and there is simply nothing to suggest that Keyser was impaired when he gave his statements to the police. This is truly nothing more than a convicted individual grasping for straws.

2. Informing Keyser about his case

Keyser claims counsel was ineffective because they did not give him all the information relating to his case, and Keyser says he had no knowledge of the evidence used at trial. Keyser raised these claims in his February 2, 2005 motion to dismiss counsel and the Court denied the motion; therefore, Rule 61(i)(4)'s

procedural bar applies. But the Court can dismiss these claims even without reference to procedural bars because Keyser does not specify which evidence counsel failed to provide. Without this information, the Court cannot determine whether counsel's representation was unreasonable or whether the outcome of Keyser's trial would have been different.

It is worth noting that counsel received over 800 pages of information relating to Keyser's case. While attorneys have a duty to inform clients about their cases' progress, that duty more often involves sharing critical and relevant information with clients rather than sharing the burden of sifting through volumes of documents. The Comments to the American Bar Association's Model Rules of Professional Conduct, while not binding on the Court, support the Court's reasoning: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests." ¹³

The Supreme Court recently addressed this issue in *Cooke v. State* and noted that counsel has "the authority to manage the day-to-day conduct of the defense," including deciding which witnesses to call and what defenses to develop.¹⁴ While counsel must "consult with the defendant on important decisions

 $^{^{13}}$ Model Rules of Prof'l Conduct R. 1.4 cmt. (2010).

¹⁴ 977 A.2d 803, 840-41 (Del. 2009).

and keep the defendant informed of important developments," counsel isn't required to ask for the defendant's consent to every tactical decision. Consistent with *Cooke*, counsel also has the authority to manage trial preparation on a day-to-day basis, including sifting through evidence and case information and making related tactical decisions, without informing the defendant of every step in that process.

Even if Keyser was unaware of some evidence in counsel's possession, nothing suggests that, if he were aware of the evidence, he would have made different fundamental decisions regarding the case. ¹⁶ It's more accurate to state that Keyser believes his case would have been stronger if he had known about all of the evidence in counsel's possession and told counsel what arguments to make therewith. But assessing evidence and forming legal arguments is exactly the purview of counsel. While counsel may not have passed every bit of information along to Keyser, the Court has no question that every important piece of evidence was discussed with Keyser and that he was involved in all critical litigation decisions. Counsel's representation did not fall below an objective standard of reasonableness.

-

¹⁵ Id. at 841 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

¹⁶ See id. (explaining that counsel must consult with the defendant on courses of action that could effect fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify, or take an appeal).

3. Abusive language and coercive tactics

i. Proof positive hearing

Keyser next contends counsel was ineffective because they coerced Keyser into unnecessarily waiving the proof positive hearing. This claim is not procedurally barred. The Court understands that the State offered to open its entire file to the defense if Keyser agreed to waive his proof positive hearing. Counsel encouraged Keyser to accept the State's offer and he did. Now Keyser alleges that waiver was unnecessary, and that counsel was thus coercive, because counsel could have obtained all of the evidence in the State's file through discovery or separate motions.

The State maintains that its file included items not available to counsel through discovery or motions practice and that it was therefore to Keyser's advantage to waive the proof positive hearing and accept the State's offer. Upon reviewing the record, the Court finds counsel's decision to encourage Keyser to waive the proof positive hearing was strategic and the Court will not disturb it. It is important to appreciate the purpose of this hearing. Defendants charged in capital murder cases are held without bail. However, the Court will hold a proof positive hearing on application from the defendant to require a minimal showing by the State that there is evidence connecting the defendant to the alleged crime.

Only when there is "good ground to doubt" the truth of the accusation will bail be considered.¹⁷ Early on in the case Keyser had implicated himself in the charged crime by talking to the police, and therefore it was very unlikely that the Court would have granted him bail. As such, counsel actually obtained an advantage that the defendant would not normally have received and did so with no negative consequences. The Court finds that counsel made a reasonable strategic decision to waive the proof positive hearing based on the circumstances.

ii. Plea agreement

Keyser claims counsel used various coercive tactics to pressure him to take a plea agreement. Once again, this claim is procedurally barred by Rule 61(i)(4) because Keyser raised it in his February 2, 2005 motion. Nonetheless, the Court will address the merits of claim purely for the sake of responding to Keyser's arguments in full.

The State offered to recommend a sentence of twenty-five years in prison if Keyser pled guilty to murder in the second degree. Counsel strongly recommended that Keyser take the plea because the State intended to ask for the death penalty if he did not. Keyser alleges that this recommendation was coercive because the plea was faulty, since it was negotiated by counsel based on Keyser's

¹⁷ 11 *Del. C.* § 2103(b).

statements to the police, "regardless of the fact that [those statements were] not true." In short, Keyser criticizes counsel for not being able to tell his truths from his lies while representing him. This is a theme in Keyser's Rule 61 motion: in the context of multiple claims he argues that counsel did not believe him. The Court cannot find that counsel was unreasonable for urging their client to accept a plea when the State's offer was a very attractive alternative to the death penalty and when their client's version of the truth was so difficult to ascertain. This claim cannot pass the first prong of *Strickland*.

Keyser also claims counsel was ineffective for not removing the corrections officer who was in the room during plea negotiations. The officer was required to be present because Keyser requested that his parents be in the room as well, and counsel told Keyser about this requirement. The Court cannot find counsel's assistance ineffective because counsel was required to keep the officer in the room if they were to abide by their client's wishes. In addition, there is absolutely nothing to suggest that, but for the officer's presence during plea negotiations, the outcome of his trial or his decision regarding the plea offer would have been different.

¹⁸ Def.'s Mot. 5.

Finally, Keyser claims counsel was ineffective because they could have drafted a plea agreement that would exculpate Keyser if new evidence was found. While such a document may have been advantageous to Keyser, there is no reason to believe the State would have accepted such an unusual agreement. Such agreements would be nonsensical in the context of criminal plea negotiations. The State had a good case against Keyser and they had no reason to accept such a one-sided proposal. Counsel effectively represented Keyser in all respects during plea negotiations, and his claims to the contrary must be denied. If he had followed his counsel's advice and taken the plea offer, he would have already served more than a third of the recommended sentence.

4. Moving the trial to a different venue

In his next claim, one not procedurally barred, Keyser alleges counsel was ineffective because they did not move to transfer the trial out of Kent County to avoid prejudicial pretrial publicity. The Sixth Amendment of the United States Constitution and the Delaware Constitution guarantee criminal defendants a trial by an impartial jury, and Superior Court Criminal Rule 21 allows for a change of venue when a criminal defendant shows there is a reasonable likelihood of prejudice, such that he cannot obtain a fair trial in the county where the charges

against him are pending.¹⁹ The Court has discretion in granting or denying a motion to change venue and generally will not grant such a motion unless the defendant demonstrates the impossibility of seating an impartial jury.²⁰

According to Keyser, the trial received local and national media attention before it began. But the bare fact of pretrial publicity does not show that a jury is reasonably likely to be prejudiced. By definition, the crime of murder carries elements of sensation, and one would expect it to receive media coverage.²¹ It is only when this coverage is *sensationalized* to the point that an impartial jury cannot be impaneled that a change of venue is warranted.²² Keyser's Rule 61 motion references no evidence of inflammatory pretrial media coverage, rendering baseless his allegations that counsel was ineffective for not moving to change venue.

In addition, the issue of media coverage was addressed with each juror during jury selection and prospective jurors who had heard or read about the murder and appeared to have been influenced by this coverage were excused. In spite of the media coverage, an unbiased jury was impaneled. The Court made sure to ask the jury, on nearly every day of the ten-day trial, whether anyone had

¹⁹ State v. Cooke, 910 A.2d 279, 282-283 (Del. Super. 2006).

²⁰ *Id.* at 283.

²¹ Id. at 286.

²² *Id*.

been exposed to media concerning the case, and only once did a juror respond in the positive.²³ Even then, the Court found the juror eligible to serve with no objection from the parties. In sum, counsel had no appropriate basis to move for a change of venue.

5. Disqualifying the judge

Next, Keyser contends that counsel was ineffective because they did not move to disqualify the judge for remarks he made at trial. On appeal, Keyser took issue with these remarks in the context of a claim of judicial abuse of discretion.²⁴ Since Keyser's claim in this motion directs his displeasure with counsel and not the trial judge, the claim is not procedurally barred.

Keyser argues that counsel should have moved to disqualify the judge for four remarks made by the Court. In the majority of the remarks he cites the judge's comments were meant to manage the courtroom and the trial's progress. Counsel correctly interpreted these comments as such and made the reasonable decision not to move to disqualify the judge when he made them.

Keyser does, however, cite the comment that the Supreme Court found improper. Despite the comment's impropriety, the Supreme Court held that the

23

²³ That juror had glimpsed a newspaper headline accompanied by the defendant's picture but had not read the article, and she told the Court that she could remain impartial despite what she saw. She continued to serve as a juror.

²⁴ Keyser v. State, 893 A.2d 956, 961-964 (Del. 2006).

judge's comment itself did not affect the outcome of Keyser's trial.²⁵ This finding controverts Keyser's claim under the *Strickland* test.²⁶

The Supreme Court of the United States has held that, for a judge to be disqualified on the basis of alleged prejudices, those prejudices "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." Such was not the case at trial. The trial judge's comments stemmed from counsel's own statements and behavior during the proceeding—not an extrajudicial source—and thus the judge's comments to counsel were the result of the judge's participation in the trial. Even if counsel had moved to disqualify the judge for his comments, the Court can find no good faith basis to grant such a motion. Therefore, this claim of ineffective assistance of counsel does not pass the two-part test provided by *Strickland*.

6. Objecting to evidence

Keyser argues that counsel was ineffective because they did not challenge the admission of the chain found around Holton's ankles or the convenience store video and pictures of Keyser and Holton. Yet again, Rule 61(i)(4) bars Keyser's

²⁵ I.d

²⁶ See Strickland v. Washington, 466 U.S. 668, 669 (1984) (holding that counsel is ineffective if, but for their errors, the outcome of a proceeding would have been different).

²⁷ U.S. v. Grinnell Corp., 384 U.S. 563, 583 (1966).

claims because he raised them in his February 2, 2005 motion. Nonetheless, the Court will entertain Keyser's arguments.

Keyser claims counsel was ineffective for not objecting to the admission of the chain because the State did not establish the chain of custody for this piece of evidence. While the evidence tag on the chain did not indicate where it originated, a New Jersey State Police detective proved the chain of custody by testifying that it came from Holton's body. In light of the detective's testimony, it was objectively reasonable for counsel not to object to the chain's admission.

Moreover, Keyser again fails to articulate how the exclusion of the chain would have changed the outcome of his trial. The chain linked Jacob Jones to Holton's murder more strongly than it did Keyser because video evidence depicted Jones buying the chain. This claim fails to meet the *Strickland* standard and is denied.

Keyser also argues that counsel should have objected to the introduction of the video and photographs of a man—allegedly Keyser—withdrawing cash from an automated teller in a convenience store. Keyser insists that the man in the video and photographs is not him, despite the fact that Keyser's bank records reflect that he withdrew cash from that automated teller at the time the video and photographs were taken. Based on this evidence, the Court cannot find that counsel fell below an objective standard of reasonableness by failing to object to

the introduction of the video and photographic evidence. These are strategic decisions relating to the presentation of the case and will not be second guessed by the Court.

7. Jury issues

Keyser has several complaints pertaining to the jury and claims that counsel's failure to address them amounted to ineffective assistance. Keyser asserts that: potential jurors indicated that counsel spoke about the case outside the courtroom; jurors asked how to be dismissed from jury duty; Keyser's father recognized a juror on the panel; two jurors engaged in conversation and window-watching while in the courtroom; correctional officers spoke about evidence in the presence of the jury; and the Court failed to excuse a juror to visit his wife in the hospital.

Keyser provides no evidence to support these claims outside of his own observations. Neither the Court nor, apparently, counsel saw jurors discussing the case outside the courtroom, asking how to be dismissed from jury duty, engaging in conversation or window-watching, or speaking with correctional officers. As such, the Court has no basis to objectively consider these issues beyond Keyser's self-serving statements. As best the Court can tell they are simply untrue.

As for the claim that Keyser's father recognized a juror on the panel, counsel addressed the issue in Court. Counsel and the Court agreed that the juror did not seem to recognize Keyser's father and that, because he was a particularly articulate juror when questioned during the selection process, he would likely notify the Court if he did. Counsel and the Court therefore agreed not to bring Keyser's father to the juror's attention and to allow the juror to continue to serve. Moreover, the juror was an alternate, and because no alternates were used during the deliberations, he played no part in determining Keyser's guilt. The Court finds no fault with the way counsel handled this matter, and it is inconceivable that the outcome of Keyser's trial would have been different if counsel had moved to dismiss the juror in question.

Keyser's claim that the Court failed to excuse a juror to visit his wife in the hospital is simply untrue. During deliberations, a juror found out that his wife fell and hurt her elbow. The Court instructed a bailiff to escort the juror to the hospital to be with his wife. The Court could not excuse this juror during deliberations, but it did excuse the juror from the penalty phase of the trial. In light of these events, counsel had no basis to object to actions taken by the Court. And, again, Keyser does not show, as required by *Strickland*, that his trial's outcome would have been different but for counsel's inaction.

8. Suppressing evidence

Keyser alleges that counsel's failure to suppress the chain, convenience store videotape and photographs, and airplane information rendered their assistance ineffective. While this claim is not procedurally barred, it was already raised in other claims in this Rule 61 motion. Keyser does not provide any new information regarding these claims. Instead, he reiterates his previous allegations, adding only conclusory comments to the effect that the police obtained this evidence illegally. Without any new information, Keyser's claims as they relate to the chain, convenience store evidence, and airplane information still do not meet the threshold for a successful ineffective assistance of counsel claim and will be denied.

But Keyser also contends that counsel was ineffective for failing to suppress the statements he gave to the police. The crux of Keyser's allegation is that counsel should have moved to suppress the statements because he tried to contact an attorney while at the police station.²⁸ Counsel recognized that Keyser's statements to the police were a lynchpin in this case and discussed these statements with their client. Keyser told them that the police advised him to retain

²⁸ Keyser also argues that he was denied food and water while at the police station and was not allowed to go outside or leave. Counsel does not believe this was true. In any event, the fact that Keyser returned to the police station on multiple occasions undercuts the force of his contention that the police coerced his confessions, such that counsel's decision not to press these arguments did not render their advocacy ineffective.

an attorney if he wanted to prove he didn't dispose of Holton's body. Keyser also said he asked for an attorney while he was at the police station. Nothing to this effect was recorded on the tapes provided to counsel, nor has Keyser suggested that anything notable took place outside of the interview process. Counsel's view was that Keyser did not manifest a specific invocation of his right to counsel. Counsel discussed this matter with Keyser in at least five conversations.

Recognizing the importance of Keyser's constitutional right to counsel, the Court gave Keyser and his attorney for this motion, Gregory M. Johnson, Esquire, an extensive period of time to investigate whether Keyser tried to reach an attorney while at the police station. Mr. Johnson contacted the service provider for the cell phone with which Keyser claims he contacted an attorney but was unable to attain the relevant records. Mr. Johnson also spoke with the attorney Keyser allegedly contacted and that attorney has no recollection of any conversation with Keyser.

The evidence counsel considered in deciding whether to file a motion to suppress indicated Keyser was *Mirandized* repeatedly and voluntarily returned to the police station several times. Counsel had no evidence, aside from Keyser's own word, that Keyser tried to contact an attorney while at the police station.

Further investigation of the matter has not unearthed any new evidence that he did.

Counsel must have a good faith basis to file a motion to suppress and here it appears none existed. As such, the Court is confident that counsel's representation did not fall below a reasonable standard when they decided not to file the motion.

9. Conclusion

In sum, the court denies all of Keyser's claims of ineffective assistance of counsel. The record reflects that Keyser's counsel advanced legitimate arguments on behalf of their client, even when counsel recognized their arguments had little chance of success. Counsel engaged in such nuanced advocacy as requesting that witnesses be referred to by their last names to avoid the impression of the State adopting certain witnesses. Counsel also honed in on language in the jury instructions to assure against bias. The Court noted at the end of Keyser's trial that the defendant was well represented by counsel, and Court has not since changed its opinion.

Prosecutor Misconduct

Keyser next alleges that the State made improper remarks during opening statements, knowingly elicited false statements from witnesses, and knowingly made Keyser out to be a liar through other witnesses' testimony. Rule 61(i)(3) procedurally bars these prosecutor misconduct claims because Keyser never

presented them claims at trial or on direct appeal. Keyser doesn't show cause for relief from the procedural default, prejudice, or a colorable claim of a constitutional violation, so he can't escape the procedural bars to his prosecutor misconduct claims.²⁹

Nevertheless, the Court is comfortable that Keyser would not prevail on these claims even if they were decided on their merits. The State's opening statement told the story of the State's case as they expected to support it with evidence and the State abided by pretrial agreements about what they could and could not tell the jury at that time. The State's comment that Holton was suffocated was not improper; the State possessed evidence that suggested, even if it did not confirm, that Holton had been strangled to death. It was the jury's duty to decide how much weight to give that evidence. The Court has reviewed the transcript of the State's opening statement in its entirety and finds nothing wrong with the State's remarks.

One detective, a witness for the State, testified that he lied to Keyser during the interrogation in order get truthful answers from Keyser. Keyser represents that this testimony shows that the State knowingly elicited false statements from its witnesses, and Keyser submits that the jury should have been informed that lying

²⁹ Super. Ct. Crim. R. 61(i)(5).

to a defendant may result in false confessions. There is nothing presented to the Court to support this conclusion and there is no question that the police may use reasonable investigative techniques that, under appropriate circumstances, may include not being totally truthful with a defendant regarding his situation. There is no constitutional right to honesty during police interrogations, and while Keyser may feel taken advantage of by the officer, there was no basis to move to suppress his statement.

Keyser contends that the State directed Detective Williams to lie about his (Detective Williams') demeanor during Keyser's interrogation. Again, Keyser presents no evidence to support this argument. While presumably Keyser would have described Detective Williams' demeanor differently, the interview was taped and the jury was free to reach its own conclusions.

Judicial Abuse of Discretion

1. Comments to defense counsel, jury, and witnesses

Keyser claims the Court made disparaging comments to defense counsel.

Rule 61(i)(4) bars these claims because Keyser already raised them on appeal,
where the Supreme Court noted that, despite the trial court's statements,
overwhelming evidence supported Keyser's conviction.³⁰ The Supreme Court also

32

³⁰ Keyser v. State, 893 A.2d 956, 963-64 (Del. 2006).

cited that Keyser didn't show that the statements affected his trial's outcome.³¹
The Court herein adopts the Supreme Court's reasoning and conclusions as they relate to Keyser's claim that the Court made disparaging comments to counsel.
The Court doesn't need to reconsider Keyser's claims in the interest of justice because the Court construes this exception to Rule 61(i)(4) narrowly and only invokes it if the movant can show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish [the movant]."³² Keyser doesn't present any subsequent legal developments that merit review.

Keyser asserts that the Court made improper jokes and comments to the jury and witnesses throughout the trial. The Court's comments were not meant to diminish or demean the significance of the judicial process, and nothing in the record suggests they were received that way. The Court can safely say that none of its comments—about courtroom technology, the weather, or even college football—affected the outcome of Keyser's trial.

2. Abuse of discretion in admitting graphic photographs

Finally, Keyser contends that the Court's admission of photographs of Holton's body prejudiced his defense and amounted to judicial abuse. Keyser did

 $^{^{31}}$ Id

³² Flamer v. State, 585 A.2d 736, 746 (Del. 1990).

not raise this issue on appeal when he argued his other claims of judicial abuse. Rule 61(i)(3) therefore bars this claim unless Keyser shows cause for relief from the procedural default and prejudice from the violation of his rights. Keyser shows neither.³³ However, Rule 61(i)(5) enables a movant to escape Rule 61(i)(3)'s procedural bar if the movant claims that the court lacked jurisdiction or that there was a miscarriage of justice because of a constitutional violation. Keyser does not challenge the court's jurisdiction and his claim that the Court's admission of the photographs amounted to a miscarriage of justice is conclusory rather than colorable.

Even so, the trial transcript reveals that the Court took precautions to exclude potentially prejudicial photographs from the trial while also letting the State present its case. A trial judge has very broad discretion in admitting photograph evidence of a victim's injuries, and the Court is required only to be aware of the photographs' possible prejudicial effects and to weigh the potential for unfair prejudice against the photographs' probative value.³⁴ During pretrial motions, the Court sifted through the State's graphic photographs of Holton's

_

³³ See Guess v. State, 2005 WL 1949990, at *2 (Del. Aug. 5, 2005) (finding defendant's confrontation clause claim procedurally barred because defendant did not demonstrate cause for his failure to raise the claim on direct appeal and prejudice from the alleged violation of his rights).

³⁴ See Ortiz v. State, 869 A.2d 285, 294 (Del. 2005) (explaining that the trial judge acted within his discretion by weighing the probative value of gruesome photographs against the possibility of unfair prejudice before admitting the photographs).

body to identify only those photographs that established the cause of Holton's death and the condition of her body when she was found. To do this, the Court analyzed the quality of each photograph, the different perspective of Holton's body provided by each photograph, whether other evidence was pictured in the photograph, whether the State could present the proffered evidence without using the photograph, whether the photographs were cumulative, and whether they were critical to the medical examiner's opinions.

The Court appreciated the potential effect the photographs would have on the jury and carefully considered the evidentiary necessity of each one. The Court was careful to admit the minimum number of photographs necessary for the State to prove its case in order not to unnecessarily inflame the jury. At trial, the Court warned the jury that the photographs they would see were not pleasant, but in the same breath noted that it was important that the jury pay attention to them. Heeding the Court's pretrial instructions, the State introduced many of its photographs through its medical examiner, who explained what the jury was viewing in scientific rather than emotional terms and who identified which marks on Holton's body resulted from the autopsy and which were present when the body was found. For all of these reasons, the Court denies that its admission of the photographs of Holton's body amounted to judicial abuse of discretion.

CONCLUSION

Michael Keyser's case was a difficult one: the State and defense counsel investigated volumes of physical and testimonial evidence relating to Holton's gruesome death while simultaneously making important litigation decisions. The trial itself demanded tireless advocacy from the attorneys and unflagging focus from the Court and the jurors over the span of multiple weeks. Keyser's trial was not perfect; very few trials are. However, Keyser's claims of ineffective assistance of counsel, prosecutorial misconduct, and judicial abuse of discretion do not justify a reversal of his conviction. For years Keyser has been looking to blame others for his predicament, but his effort here to blame counsel, the police, and the Court will be unsuccessful. While Keyser's life was dramatically changed the moment he participated in the events that led to Holton's death, he has only himself to blame. The Court spared Keyser's life in spite of the jury's recommendation of death, but there is no question that he is guilty of the homicide and that he received a fair trial. For the reasons discussed, Keyser's Rule 61 motion is DENIED in its entirety.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

_____Judge William C. Carpenter, Jr.